United States Court of Appeals

for the Second Circuit

APPENDIX

No. 76-4100

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

SZABO FOOD SERVICES, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition for Review of Decision and Order of National Labor Relations Board

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JOINT APPENDIX

REED, SMITH, SHAW & MCCLAY
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JOINT APPENDIX

Chronological List of Relevant Docket Entries Below

1. Petition of Local 217, Hotel and Restaurant Employees Union, AFL-CIO to be certified as the exclusive representative for collective bargaining purposes of all food service employees at the Employer's food service operations in the Stratford, Connecticut and Bridgeport, Connecticut plants of Sikorsky Aircraft.
2. Employer's brief in Case No. 2-RC-16612 received November 25, 1974.
3. Union's brief in Case No. 2-RC-16612.
4. Regional Director's Decision and Order dated December 19, 1974.

5. Union's Request for Review of Regional Director's Decision and Order dated January 15, 1975.
6. Employer's Opposition to Request for Review of Regional Director's Decision and Order dated January 21, 1975.
7. Board's telegram granting Union's Request for Review.
8. Employer's Brief on Board's Review of Decision and Order of Regional Director dated March 11, 1975.
9. Board's Decision on Review and Direction of Election dated July 25, 1975.
10. Notice of Election to be held on August 22, 1975.
11. Tally of Ballots dated August 22, 1975.
12. Certification on Conduct of Election dated September 2, 1975.
13. Unfair Labor Practice Charge filed by Union on September 20, 1975, in Case No. 2-CA-13913.
14. Complaint and Notice of Hearing dated October 10, 1975.
15. Employer's Answer to Complaint dated October 23, 1975.
16. General Counsel's Motion for Summary Judgment and Issuance of Decision and Order dated December 29, 1975.
17. Employer's Response to General Counsel's Motion for Summary Judgment and Issuance of Decision and Order dated December 29, 1975.
18. Board's Order Transferring Proceeding to the Board and Notice to Show Cause dated January 6, 1976.
19. Employer's Answer to Motion for Summary Judgment and Issuance of Decision and Order dated January 6, 1976.
20. Decision and Order issued by the Board dated March 1, 1976.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

Case No. 2-RC-16612

SZABO FOOD SERVICES, INC., *Employer*

and

LOCAL 217, HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS UNION, AFL-CIO,[1] *Petitioner*

Decision and Order

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Don C. Carmody, a Hearing Officer of the National Labor Relations Board. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director for Region 2.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

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[1] The names of the parties appear as amended at the hearing.

The Employer is an individual food service contractor performing such services for, among other clients, United Aircraft Corporation, herein called United. In the State of Connecticut, the Employer operates 18 cafeterias and a kitchen at 10 separate United locations where it employs a work force of approximately 415 employees. The Petitioner seeks to represent all food service employees, about 50 in number, in 3 of these cafeterias, at two locations, namely, the Stratford and the Bridgeport plants of Sikorsky Aircraft, a division of United. The Employer contends that the only appropriate unit herein must encompass all of its United operations in Connecticut (referred to by the Employer as its United Aircraft District), and seeks dismissal of the petition on the ground that the unit requested is an inappropriate fragment thereof. There is no history of collective bargaining for the employees involved herein. For the reasons that follow, I agree that the petition should be dismissed.

Since at least 1961, the Employer has had a contract with United to maintain and service cafeterias, dining rooms and kitchens for feeding the employees at its Connecticut plants. As noted, United presently has plants in 10 towns or cities in Connecticut where the Employer performs these services in 19 different food service facilities.[2] The headquarters of the Employer's Connecticut operations is located in East Hartford. From here the District Manager administers the district. Reporting to him are three supervisors who are directly responsible for the operation of various cafeterias. One of the supervisors is in charge of five cafeterias; three of them at plants in Windsor Locks; one in Farmington; and one in East Hartford. Another supervisor controls six cafeterias and the central kitchen in East Hartford, a cafeteria in Middletown and one in South Windsor. The third supervisor is in charge of a cafeteria in Norwalk, one in Southington, one in North

[2] At some installations there is more than one food service operation.

Haven, and those which Petitioner seeks to represent in Stratford and in Bridgeport. The approximate distances of these two facilities from those the Employer would include range from 14 to 65 miles.

All of the food servicing is administered pursuant to a single contract with United, with the result that all of the food operations are governed by identical terms and regulations. All menus are the same in all cafterias as are all the prices charged. All baked goods are prepared in the central kitchen in East Hartford and delivered to each eating facility regularly. All purveyors of foodstuffs are chosen by central management of the Employer from its headquarters in Chicago and prices are negotiated from there. All payroll and accounting is channeled through the District Manager for processing.

The District Manager sets the pay rates and all terms and conditions of employment for all employees within the United district. He also decides the number of employees needed in each facility, and is the final authority for the resolution of grievances and changes in employee status.

As described above, each of three supervisors is in charge of a number of installations. Directly beneath these supervisors, in the chain of command, are persons designated by the Employer as unit managers. There is a unit manager at each of the United locations except that Bridgeport and Stratford, the installations sought by Petitioner, are treated as a single operation, and are supervised by one unit manager. If a cafeteria serves food for more than one work shift there is an assistant manager or a chef manger. The unit manager has authority to recommend that employees be fired, promoted, or receive a pay raise, and in extreme cases of misfeasance he may fire an employee on the spot. He can issue written reprimands to employees with the approval of the supervisor having responsibility for that cafeteria. To effect any other change in employee status, the unit manager recommends, and through the

supervisor, the approval of the District Manager must be secured. Although the unit manager can hire a replacement he can not vary the size of the work force without higher approval.

The testimony of the Employer's witness established that during the past year there were 700 temporary transfers between the various Connecticut locations. It also appears that employees may be promoted and moved to higher ranking positions in other locations within the district.

The unit sought by Petitioner comprises a cafeteria in Bridgeport and two cafeterias in Stratford, in one of which all the food preparation is performed for the three facilities. While these two locations are considered as a single operation, the unit manager in charge has the same authority and responsibility as all other unit managers. With respect to transfers, the unit manager testified that he has requested additional help from his supervisor in cases of need, and temporary transfers were made from Southington, North Haven, and Norwalk, as well as East Hartford, for various special events.[3] For example, the foremen's dinners which are held from time to time required an extra 10 to 12 employees who would come from the other locations to assist in the preparation and service of the event.

In a multi-facility or chain operation, it is well established Board policy to find a single facility to be presumptively an appropriate unit, but that such a presumption may be overcome where it is established that the day-to-day interests of employees in one facility are merged with those of employees in the rest of the chain.[4] In deciding whether a single location is appropriate where the Employer operates a number of similar facilities, the Board

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[3] It is noted that employees in the unit sought who attended the hearing were temporarily replaced by employees from other facilities.

[4] *Haag Drug Company, Incorporated*, 169 NLRB 877.

looks to various factors to determine whether the employees comprise a homogeneous, identifiable and distinct group. These factors include bargaining history, geographical proximity, integration of operations, similarity of skills and function, the extent of a common labor policy, the extent of common supervision, degree of local autonomy and interchange.[5] Based on the facts in this record I am persuaded that the unit petitioned for has been effectively integrated into a more comprehensive unit and therefore cannot stand alone as an appropriate unit.

Applying the criteria set forth above it becomes clear that the three cafeterias in the Stratford and Bridgeport installations do not by themselves constitute an appropriate unit. There is no history of collective bargaining for these employees.[6] The cafeterias admittedly are spread over a part of Connecticut, but even those sought in a single unit by Petitioner are separated by about five miles. More significant, however, than the geographic separation is the extent of the integration of operations and common labor policy and supervision. In this case all facilities are centrally administered. Menus, purchasing, accounting, payroll, etc., are centrally controlled. Baked goods are prepared at one location for all cafeterias. Under one contract with the Employer, United sets identical conditions and requirements for the operation of all of the cafeterias, and it appears that all complaints and matters pertaining to the contract are handled at the District Manager level. All employee conditions such as employment and staffing, payroll, wages, promotions, layoffs, etc., are determined by the District Manager. All employee benefits are similar and are centrally established and administered.

Employees at all the facilities are engaged in the same type of food preparation and food serving work, perform

[5] *Gray Drug Stores, Inc.*, 197 NLRB 924.

[6] A 1956 Decision of the Connecticut State Board of Labor Relations involving a predecessor employer finding separate appropriate units at East Hartford, Windsor Locks and Southington, is not relevant to the issues before me. I note that no collective bargaining history ensued.

the same kind of cleaning and utility maintenance and have the same job classifications in each facility. The wage rates for all are the same.

The record establishes that the individual unit manager is not autonomous in the operation of the facility he supervises. Though he may hire replacements, he may only recommend promotions, raises, and firings, except in extreme cases. Any change in employee status can only be made by the District Manager. It does not appear that the unit manager handles employee grievances and he may only reprimand employees with the approval of his supervisor.

Several facilities have common second level supervision in the chain of command up to the District Manager. Thus the Stratford-Bridgeport operation is directed by the same supervisor who is responsible for three other locations, and it is to this supervisor that the unit manager turns for assistance in special events and for extra help. Lastly, the uncontroverted testimony established that there had been a substantial number of temporary transfers between all the various locations in the United district in the past year involving as well the Stratford-Bridgeport operation sought by Petitioner.

In summation, it appears from the record that all the facilities of the Employer are operated under standardized procedures and central management. The individual unit manager has minimal discretion with regard to labor relations and little autonomy in the management of the installation, as all decisions are reached at higher levels. It is doubtful that the unit manager could represent the Employer in collective bargaining. Therefore, the unit sought by Petitioner is too limited in scope and as a result is not an appropriate unit for collective bargaining purposes.[7] Accordingly, and as Petitioner does not appear to have

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[7] *The Wackenhut Corporation*, 213 NLRB No. 50; *Purity Supreme, Inc.*, 197 NLRB 915; *Twenty-First Century Restaurant*, 192 NLRB 881; *Cf. Marriott In-Flite Services*, 209 NLRB No. 74.

indicated a desire to represent employees in a larger unit, I shall dismiss the instant petition.

Order

IT HEREBY IS ORDERED that the petition filed herein be, and it hereby is, dismissed.[8]

Dated: December 19, 1974

at New York, New York

/s/ SIDNEY DANIELSON
SIDNEY DANIELSON, REGIONAL DIRECTOR
REGION 2
NATIONAL LABOR RELATIONS BOARD
26 Federal Plaza, Room 3614
New York, New York 10007

Union's Memorandum To Board In Support of Request for Review of Regional Director's Decision and Order, pp. 12-13

* * *

5. THE REGIONAL DIRECTOR ERRED BY TOTALLY IGNORING THE EXTENT OF ORGANIZATION.

It has long been Board law that while the extent of organization is not the controlling factor in determining the scope of an appropriate unit, it is relevant and must be given weight. *United Gas, Inc.*, 190 NLRB No. 123, 77 LRRM 1656 (1971); *N.L.R.B.* v. *Ideal Laundry and Dry Cleaning Co.*, 372 F.2d 307, 64 LRRM 2353 (1967).

In the instant matter no labor organization is seeking a unit broader in scope than the one proposed by Petitioner. There is no evidence of any interest in organization by the

[8] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board in Washington, D. C. This request must be received by the Board in Washington by January 2, 1975.

employees in the larger unit claimed by the Employer. In addition, Petitioner's jurisdiction does not encompass the statewide unit claimed by the Employer, which makes it probable that the Regional Director's Decision will frustrate the purposes of the Act by making it impossible for these employees to gain representation by the labor organization which represents employees in their industry, which is the only labor organization seeking to represent them.

The Regional Director totally ignored the significance of these facts in making his Decision, and thereby ignored Board law.

* * *

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 2-RC-16612

SZABO FOOD SERVICES, INC., *Employer*

and

LOCAL 217, HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS UNION, AFL-CIO, *Petitioner*

Decision on Review and Direction of Election

On December 19, 1974, the Regional Director for Region 2 issued a Decision and Order in the above-entitled proceeding, in which he found inappropriate the Petitioner's requested unit of all food service employees employed by the Employer at three cafterias operated by it at the Stratford and Bridgeport, Connecticut, plants of the Sikorksky Aircraft Division of United Aircraft Corporation. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Petitioner filed a timely request for review of

the Regional Director's decision, on the grounds, *inter alia,* that in finding the petitioned-for unit inappropriate he made erroneous findings as to substantial factual issues and departed from officially reported Board precedent. Thereafter, Employer filed a statement in opposition thereto.

The National Labor Relations Board, by telegraphic order dated February 19, 1975, granted the request for review and stayed the election pending decision on review. Thereafter, Employer filed a brief on review.

219 NLRB No. 102

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this proceeding with respect to the issues under review, including the Employer's brief on review, and finds, contrary to the Regional Director, that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act, for the following reasons:

The Petitioner contends that the record supports a finding that its requested three-cafeteria unit is appropriate. We agree.

The Employer is an industrial food service contractor. Under its contract with United Aircraft, it operates cafeterias, dining rooms, and kitchens for feeding the employees at the latter's Connecticut plants.[1] It employs approximately 415 employees at these facilities. There are about 50 employees in the Petitioner's requested unit. There is

[1] The Employer refers to these operations as its United Aircraft District. United Aircraft at present has plants in 10 towns or cities in Connecticut, and the Employer operates 19 different food service facilities at these plants.

no history of collective bargaining for any of the Employer's United Aircraft District employees.

Headquarters for the Employer's United Aircraft District is at East Hartford, Connecticut.[2] Also located there is a central kitchen where baked goods are prepared for the district food service facilities. The various food service facilities are for purposes of accountability subdivided into cost centers or units, generally confined to single-plant locations. However, the three cafeterias located at the two Sikorsky Division plants, here sought to be combined as a separate bargaining unit, comprise a single cost center or unit, referred to herein as the Sikorsky unit. Each of these units is directly under a "unit" manager, who reports to one of three area supervisors. The area supervisor over the Sikorsky unit also oversees the Norwalk, Southington, and North Haven units.[3] Geographically, the Sikorsky plants are but 5 miles apart, and the range of distances separating them from other district facilities is 14 to 65 miles.

The food programs are administered uniformly pursuant to the contract with United Aircraft. All menus and prices are the same at all cafeterias. The Employer's management in Chicago chooses food vendors and negotiates prices with the vendors. The unit manager purchases foodstuffs from a list which has been approved by central management in Chicago.

The district manager sets the pay rates and terms and conditions of employment for the Employer's United Aircraft District. He decides the number of employees needed

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[2] Centralized management for all of the Employer's operations is in Chicago, Illinois.

[3] The record contains little evidence as to the specific duties of the area supervisors and does not indicate how frequently they visit the various units within their respective areas. It appears that they act as liaisons bteween district headquarters and the units, especially with regard to matters as detailed below, which are closely controlled by headquarters.

at each facility and makes the final decision in the resolution of grievances and, except as noted below, with regard to changes in employee status. Unit managers make effective recommendations through their area supervisors to the district manager as to discharge, promotion, and pay increases concerning employees under them. In cases of gross misconduct the unit manager may discharge an employee. The unit manager may also issue written reprimands with the approval of his area supervisor. Within the personnel complement allotted to his cost center, a unit manager can hire replacements.

There were only four instances cited involving permanent transfers affecting the Sikorksky unit. During the year immediately prior to the hearing, there were 700 temporary transfers of 1 day or less among the different cafeterias. These temporary transfers represented less than 1 percent of the man-hours worked per year, and only about 16 percent of them affected the Sikorsky unit. These temporary 1-day transfers are mainly for monthly foreman's dinners. Others occur sporadically, in connection with "family days," "fly-ins," and "division president dinners."

While it appears that the broader districtwide unit favored by the Employer would be appropriate for purposes of collective bargaining, we are persuaded by the foregoing facts and our review of the record that the requested unit, confined to employees at the three Sikorsky Division cafeterias, is also appropriate. That these employees have a community of interest separate and distinct from the broader one they share with other district employees, sufficient to support an appropriate unit finding, is amply demonstrated by the following factors: First, and foremost, the requested employees are under the common immediate supervision of a single manager by virtue of the fact that the three Sikorsky Division cafeterias are grouped together as a single unit or cost center for pur-

poses of accountability. Also, despite the integration of all operations of the district, the Sikorsky unit manager retains significant control over day-to-day operations, especially with regard to discharge of employees for serious misconduct and the hiring of replacements. Geographically, the Sikorsky plants are but 5 miles apart and the next closest cafeteria is 14 miles away.[4] Temporary interchange of employees appears to involve for the most part special functions and does not occur on a regular or frequent basis. Finally, there is no history of bargaining for employees in the district and no labor organization is seeking to represent the broader unit favored by the Employer.

Accordingly, we shall direct an election in the following unit, which we find to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[5]

> All food service employees at the Employer's food service operations in the Stratford and Bridgeport, Connecticut plants of Sikorsky Aircraft, excluding office clerical employees, guards, and supervisors as defined in the Act.

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[4] We are unable to understand how our partial reliance on geographic separation is "improper" because the cafeterias are "located in an arc leading Northeast," as characterized by our dissenting colleague. The cafeterias in the unit sought are located within 5 miles of each other; whereas over half of the employees in the Employer's proposed unit are located more than 50 miles away from Petitioner's proposed unit. The Board has long held (see, e.g., *Dixie Belle Mills, Inc.*, 139 NLRB 629 (962)) that geographic separation is a very real consideration in an issue concerning unit scope. It remains a factor notwithstanding the geometric configuration and juxtaposition of the cafeterias involved.

[5] See *Motts Shop Rite of Springfield, Inc. and Motts Shop Rite of Chicopee, Inc.*, 182 NLRB 172 (1970), and cases cited therein at fn. 3.

The cases cited by our dissenting colleague to support his contrary view are, in our opinion, factually distinguishable. The *Lawson Milk, Company Division, Consolidated Foods Corporation*, 213 NLRB No. 60 (1974), to which he refers as support for his argument that the degree of temporary interchange is significant as it affects the requested unit herein, involved incidents of temporary transfers of store employees to perform day-to-day operations, unlike the instant case where the transfers, of 1 day or less in duration, were mainly for special functions and not for the day-to-day operations of the cafeterias.

Direction of Election

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 2 shall direct and supervise the election, subject to the National Labor Relations Board rules, Series 3, as amended. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period; employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[6] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Petitioner, Local 217,

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[6] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 2 within 7 days of the date of this Decision and Direction of Election. The Regional Director shall make this list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Hotel & Restaurant Employees and Bartenders Union, AFL-CIO.

Dated, Washington, D.C., July 25, 1975.

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER KENNEDY, dissenting:

I agree with the Regional Director's conclusion that the three cafeterias sought cannot stand alone as an appropriate unit and that the petition should be dismissed. The Regional Director was correct in concluding that all of the Connecticut cafeterias servicing employees of United Aircraft Corporation at its 10 separate locations constitute the smallest unit appropriate for purposes of collective bargaining. In my judgment, reversal of the Regional Director by my colleagues is not justified by the factors or the precedent and is contrary to the prohibition in Section 9(c)(5) of the Act that the Board shall not establish bargaining units solely on the basis of extent of organization.

Like the Regional Director, I think it highly significant that all cafeteria employees of the Employer are engaged in the performance of a single contract with United Aircraft. Pursuant to that contract, all menus and all prices are the same in all cafeterias. The district manager who administers this contract establishes the same wages, hours, and working conditions for all the employees in all the cafeterias in the United Aircraft facilities. Thus, under one contract with the Employer, United Aircraft sets identical conditions and requirements for the operation of all the cafeterias, and it appears that all complaints or matters pertaining to that contract are handled at the district manager level.

In the long run, I do not think that the decision of the majority furthers the interest of the employees sought by Petitioner. While the decision to permit some 50 employees out of a work force of 415 employees to be represented separately may make initial organization of the employees easier, it is difficult to conceive of meaningful bargaining taking place if the employees choose Petitioner as their bargaining agent. An employer who has established wages, fringe benefits, and other labor relations policies on a much broader basis is hardly likely to be willing to let a tail this size wag the dog. The Board stated in *Kalamazoo Paper Box Corporation,* 136 NLRB 134, 137 (1962), that "each unit determination, in order to further effective expression of the statutory purposes, must have a direct relevancy to the circumstances within which collective bargaining is to take place. For, if the unit determination fails to relate to the factual situation in which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered." It seems to me that the unit found by the majority may well produce just the kind of employee frustration and resultant instability which effective collective bargaining should prevent.

Contrary to my colleagues, I do not believe that the unit managers are vested with sufficient supervisory authority to justify the unit found by my colleagues to be appropriate. The Employer's operations are highly centralized. The district manager is the only supervisor capable of negotiating wages, salaries, and other terms and conditions of employment since he is vested with most of the power in this area. The three supervisors directly beneath the distrist manager are further proof of the lack of autonomy of the unit managers. It appears that the only decisions a unit manager can make without prior approval are hiring replacements within an approved complement and firing an employee on the spot because of gross misconduct. In all other matters the supervisors and the district manager must be consulted. The district manager makes the ulti-

mate decisions. More importantly, he determines the wage scales, the focal point of all collective bargaining.[7]

Although the Employer does treat the Sikorsky unit as a separate cost center, this is done for purposes of accounting and budgeting rather than for purposes related to or concerning labor relations. Even if the minimal geographic separation in this case were considered important enough to warrant a single unit, the centralization of wage policy and key decisions compel finding the broader unit appropriate.[8]

I disagree with the observations of my colleagues with respect to the interchange of employees. The Regional Director found that during the year preceding the hearing there were some 700 temporary transfers between various Connecticut locations. Indeed, during the hearing in this very case, the employees who attended the hearing were temporarily replaced by employees from other facilities. It also appears that employees are promoted to higher ranking positions in other locations within the district. Under these findings, which are not challenged in the request for review, I think my colleagues err in suggesting that the absence of "regular or frequent" temporary interchange of employees is a factor in this record to justify their unit finding.

In this connection, I note that in *National Telephone Company, supra,* we stated:

> We therefore shun any detailed attempt, on the basis of the incomplete sampling submitted, to discern precisely what percentage of man-hours may have been involved in temporary transfers or the precise nature or purpose of each transfer. We do conclude that it is plain enough, upon this record, that the movement

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[7] *Patria Stores Corporation,* 212 NLRB No. 14 (1974).

[8] *National Telephone Company, Inc.,* 215 NLRB No. 17 (1974); *AMF Cuneo Division, AMF Incorporated,* 205 NLRB No. 160 (1973).

> of employees on a temporary basis from location to location within the division is far from an uncommon experience and is resorted to, as the testimony clearly shows, not as a result of the growth or expansion of the Company, but "to accommodate for a heavier workload in one branch than exists in the branch from which the transfer takes place."

In *National Telephone* there had been only 36 transfers in a 9- or 10-month period. In this case, there were 700 instances of transfers in a 12-month period. Similarly, in *The Lawson Milk Company Division, Consolidated Foods Corporation,* 213 NLRB No. 60 (1974), where a districtwide unit of retail food stores was found appropriate, we considered it significant that 204 temporary transfers had occurred in a unit of 334 employees in a 12-month period. In the instant case, the 700 transfers among 415 employees is a strong factor favoring the broader unit.

The majority decision herein also improperly relies on geographic separation. Examination of the map of Connecticut received in evidence shows that the different facilities of the Employer are all located in fairly close proximity. The cafeterias are not scattered at random over the State; rather they are located in an arc leading Northeast from Norwalk to Windsor Locks on excellent highways. Although the distance between the two cafeterias furthest apart is 79 miles, the *maximum* distance between any two cafeterias is 23 miles. Some are only 7 to 10 miles apart.[9]

Since I conclude that the factors present in this case compel finding a districtwide unit to be the only appropriate unit, I dissent.[10]

Dated, Washington, D.C., July 25, 1975.

RALPH E. KENNEDY, Member
NATIONAL LABOR RELATIONS BOARD

[9] *The Lawson Milk Company, supra.*

[10] *Gourmet, Inc., d/b/a Jackson's Liquors, et. al.,* 208 NLRB No. 103 (1974).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 2-RC-13913

SZABO FOOD SERVICES, INC.

and

LOCAL 217, HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS UNION, AFL-CIO

Decision and Order

Upon a charge filed on September 26, 1975, by Local 217, Hotel & Restaurant Employees and Bartenders Union, AFL-CIO, herein called the Union, and duly served on Szabo Food Services, Inc., herein called the Respondent, the Acting General Counsel, herein called General Counsel, of the National Labor Relations Board, by the Regional Director for Region 2, issued a complaint on October 10, 1975, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 2, 1975, following a Board election in Case 2-RC-16612, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about September 22,

[1] Official notice is taken of the record in the representation proceeding, Case 2—RC—16612, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (C.A. 5,

1975, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On October 24, 1975, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 19, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and, on December 29, 1975, Respondent filed its "Response to General Counsel's Motion for Summary Judgment and Issuance of Decision and Order." Subsequently, on January 6, 1976, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed its "Answer to Motion for Summary Judgment and Issuance of Decision and Order" as a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response and answer to the General Counsel's Motion for Summary Judgment, Respondent admits its refusal to bargain but attacks the validity of the Union's certification on the basis of its

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1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

objection to the appropriateness of the bargaining unit for which the Union is certified.

Review of the record herein, including the record in Case 2-RC-16612, reveals that a petition was filed by the Union, on September 11, 1974, seeking to represent Respondent's food service employees in three of its cafeterias at two locations, the Stratford and Bridgeport, Connecticut, plants of Sikorsky Aircraft. Respondent contended that the only appropriate unit must encompass all employees at its 18 cafeterias at 10 separate locations in Connecticut. Following a hearing, the Regional Director issued his Decision and Order on December 19, 1974, in which he found that the unit sought by the Union was not appropriate for collective-bargaining purposes and, accordingly, the petition was dismissed. The Union filed a request for review of the Regional Director's Decision with the Board in Washington, D.C. By telegraphic order dated February 19, 1975, the Board, with former Member Kennedy dissenting, granted the request as raising substantial issues warranting review. On July 25, 1975, a Board Panel composed of Members Fanning and Jenkins, with former Member Kennedy dissenting, issued its Decision on Review and Direction of Election[2] in which the Board reversed the Regional Director's determination and directed an election in the unit sought by the Union, which it found to be appropriate. Pursuant to the Board's Direction of Election, an election was held on August 22, 1975, which the Union won. Thereafter, on September 2, 1975, in the absence of objections filed to the tally of ballots or to the conduct of the election, the Union was certified as the exclusive collective-bargaining representative of the employees in the unit found to be appropriate.

It thus appears that Respondent is attempting to relitigate herein an issue which was raised and determined

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[2] 219 NLRB No. 102.

adversely to it in the underlying representation case. It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. *The Business of the Respondent*

At all times material herein, Respondent, a Delaware corporation, has maintained an office and place of business at the Sikorsky Aircraft plant in Bridgeport, Connecticut, at the Sikorsky Aircraft plant in Stratford, Connecticut, and at various other places of business in the State of Connecticut, and in more than 30 other States of the United States, where it is engaged in providing industrial and institutional feeding services and related services as a food service contractor. During the past year, a representative period, Respondent, in the course and conduct

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

of its business operations, derived gross revenues from its operations in excess of $1 million, of which services in excess of $50,000 were furnished to, among others, United Aircraft Corporation, which enterprise annually produces goods valued in excess of $50,000 which it ships directly out of the State wherein said enterprise is located.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. *The Labor Organization Involved*

Local 217, Hotel & Restaurant Employees and Bartenders Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. *The Unfair Labor Practices*

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All food service employees at Respondent's food service operations in the Stratford and Bridgeport, Connecticut, plants of Sikorsky Aircraft, excluding office clerical employees, guards, and supervisors as defined in the Act.

2. The certification

On August 22, 1975, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 2 designated the Union as their representative for the

purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 2, 1975, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 2, 1975, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 22, 1975, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since September 22, 1975, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. *The Effect of the Unfair Labor Practices Upon Commerce*

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The Remedy*

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Szabo Food Services, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 217, Hotel & Restaurant Employees and Bartenders Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All food service employees at Respondent's food service operations in the Stratford and Bridgeport, Connecticut, plants of Sikorsky Aircraft, excluding office clari-

cal employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 2, 1975, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 22, 1975, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Szabo Food Services, Inc., Stratford and Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 217, Hotel & Restaurant Employees and Bartenders Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All food service employees at Respondent's food service operations in the Stratford and Bridgeport, Connecticut, plants of Sikorsky Aircraft, excluding office clerical employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interferring with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if any understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facilities at the Stratford and Bridgeport, Connecticut, plants of Sikorsky Aircraft copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C., March 1, 1976.

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

PETER D. WALTHER, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Appendix

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board

An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local 217, Hotel & Restaurant Employees and Bartenders Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All food service employees at Respondent's food service operations in the Stratford and Bridgeport, Connecticut, plants of Sikorsky Aircraft, excluding office clerical employees, guards, and supervisors as defined in the Act.

SZABO FOOD SERVICES, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 36th Floor, Federal Building, 26 Federal Plaza, New York, New York 10007, Telephone 212-264-0360.